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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

No. 80-1169

FAULKNER RADIO, INC.,

Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY TO "BRIEF FOR THE RESPONDENT IN OPPOSITION"

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March 1981

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REPLY

THE COURT SHOULD AND MUST CONSIDER THE CONSTITUTIONALITY OF THE COMMISSION'S STRIKE PETITION POLICY AT THIS TIME

In its "Brief for the Respondent in Opposition" the Government argues that there is no need for the Court to

reach petitioner's challenge to the Federal Communications Commission's "strike petition" policy, since the Commission concluded (and the Court of Appeals affirmed the Commission's decisions) that the misrepresentations and lack of candor of Faulkner Radio, Inc.'s (Faulkner) former vice president and minority stockholder constituted sufficient and independent grounds for denying Faulkner's renewal application, citing *Barr v. Matteo*, 355 U.S. 171, 172 (1954). In *Barr*, this Court vacated and remanded a decision of the U.S. Court of Appeals for the District of Columbia Circuit with directions to the court to pass on a narrower question which would have been dispositive of the case. The Court noted that it could not issue advisory opinions and could not settle an important issue of constitutional law "unless actually compelled by the litigation before it." 355 U.S. at 172. As set forth below, the effect of the Commission's holding with regard to the strike petition issue compels this Court's consideration of the constitutional issue raised.

Moreover, since and despite its holding in *Barr*, this Court has on occasion addressed broad legal and constitutional issues, not compelled by the cases before it. *See, e.g., Communist Party of Indiana v. Whitcomb*, 414 U.S. 441 (1974) (in which the Court addressed the broader question of the constitutionality of an Indiana loyalty oath statute despite the fact that the case could have been decided on a narrower issue); *O'Shea v. Littleton*, 414 U.S. 488 (1974) (in which the Court held that a complaint failed to satisfy the threshold case or controversy requirement and then proceeded to discuss whether, even assuming the complaint had presented a case or controversy, the complaint stated a sound basis for equitable relief). Thus, it is clear that *Barr* does not

preclude this Court from addressing the constitutional issue presented in Faulkner's case.

I.

IF THE COURT FAILS TO ADDRESS THE CONSTITUTIONALITY OF THE COMMISSION'S STRIKE PETITION POLICY, THE *FAULKNER-RADIO CARROLLTON* DECISIONS WILL REMAIN A WARNING TO ALL RADIO AND TELEVISION LICENSEES THAT THEY CANNOT FILE PETITIONS TO DENY APPLICATIONS OF POTENTIAL COMPETITORS WITHOUT RISKING FORFEITURE OF LICENSE.

The *Faulkner-Radio Carrollton* decisions, if allowed to stand, will have a chilling effect on the constitutional right of all licensees to file petitions to deny against competitors or potential competitors. The FCC decisions clearly stand for the principle that the filing of a petition to deny for the primary purpose of delay is ground for the denial of a petitioner's renewal application. The adverse impact on the public interest is as clear and immediate as if the strike petition finding were the sole ground for denial of Faulkner's renewal application.[1]

The Court of Appeals shared Faulkner's concern for the chilling effect the FCC's strike policy would have on the First Amendment rights of broadcast licensees, and, in remanding this case to the Commission in 1977, the

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[1] This Court has recognized in cases involving communications and antitrust that it is the one who is likely to be economically injured by competition who will be motivated to provide information to the government. *See, e.g., Eastern Railroad Presidents Conference v. Noerr Motor Freight*, 365 U.S. 127 (1961); *FCC v. Sanders Bros. Radio Station*, 309 U.S. 470 (1940). The FCC's strike petition policy is only applicable to licensees who file petitions against competitors or potential competitors.

Court stated that the Commission would be "well advised" to clarify its policy on strike petitions. App. 54a. The Commission originally defined a strike petition as one filed where *one of* the purposes in filing was "to obstruct, impede and delay the grant" of an application. App. 66a. On remand, the Commission "clarified" this definition to encompass only those petitions filed with the "primary" purpose to delay. App. 10a. It is submitted that this clarification does not remove the chilling effect upon a licensee's constitutional right to petition its government. If the "clarified" policy is allowed to stand, a licensee will know that there will be a weighing or measuring of its motives in filing a petition[2] and that, if the FCC determines that its primary purpose was delay, it will be found unqualified to be a Commission licensee. The factors upon which the Commission will base its determination of whether a licensee's primary purpose was to delay include the licensee's economic motivation. App. 29a. Moreover, the fact that the petition raises serious, bona fide issues against an applicant will not preclude the Commission from finding that the petitioner's delaying purpose was primary. The Commission found that two of the three issues raised by Faulkner Radio, Inc. (Faulkner) in its original petition to deny and seven of its eight supplements thereto were bona fide. App. 33a and n. 30, App. 65a and n. 14. Yet the Commission concluded that Faulkner's primary purpose in raising bona fide issues against its potential competitor was to delay grant of its competitor's application.

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[2] It is reasonable to anticipate that any applicant against which a petition to deny is filed by a competitor will as a tactical device charge that it is a strike petition in order to shift the attack to the petitioner and away from itself. The requirement to respond to a charge of improper motive alone is chilling.

It is submitted that the Government's argument that *United Mine Workers v. Pennington*, 381 U.S. 657 (1965), and *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961), do not support Faulkner's right to file a petition to deny is simply wrong. Those cases held that the right to petition the government included the right to petition for action even though the sole purpose in petitioning was to destroy competitors. The rationale of those cases is fully applicable to the instant case, since the purpose of the petitioners in those cases and in *Faulkner* is the same.

II.

THE FCC'S FINDING THAT FAULKNER RADIO, INC. FILED A STRIKE PETITION MAY WELL BE THE DECISIVE FACTOR IN THE FCC'S DETERMINATION ON THE FATE OF FAULKNER'S OTHER SIX BROADCAST LICENSES.

In the *Radio Carrollton* decisions the Commission made two separate findings relating to Faulkner's character qualifications and held that each was an independent reason for denying Faulkner's application for renewal of the license of WLBB. In *Faulkner Radio, Inc.*, 61 F.C.C.2d 23 (1976), App. 55a, the FCC, in an unprecedented action, decided that, in lieu of the normal evidentiary hearing, it would order an oral argument on Faulkner's other six radio licenses. The Commission stated that its findings in the *Radio Carrollton* decision (1975) would be "*res judicata*" as to all of Faulkner's other broadcast holdings. App. 57A. The only issues specified for oral argument were:

> "1. To determine, in light of the Commission's findings in the matter of *Radio Carrollton, et al.*, 52 FCC2d 1173 (1975), whether Faulkner Radio, Inc.

possesses the requisite qualifications to be a broadcast licensee of this Commission.

"2. To determine, in light of the arguments made with respect to the foregoing issue, whether a grant of the above-captioned applications for renewal of licenses would serve the public interest, convenience and necessity." App. 57a.

The above oral argument has been continued pending final resolution of the instant proceeding. When the proceeding on the six licenses resumes, the Commission will apply its findings on *both the strike petition and misrepresentation issues* against Faulkner. While these findings will not be "*res judicata*",[3] Faulkner will be collaterally estopped from rearguing the merits of the Commission's findings. This inquiry is sufficient to justify Supreme Court consideration of Faulkner's right to petition under the First Amendment.

The Commission's findings on misrepresentation were *all* based on the conduct of Robert M. Thorburn, who was formerly Faulkner's Vice President and 15 percent shareholder. The findings on misrepresentation and lack of candor all involved Thorburn's testimony in the hearing and " 'his seeking to deceive the Commission in the submission.' of some of his affidavits." App. 26a. These activities of Thorburn were beyond the control of Faulkner Radio, Inc. and its majority stockholder, James H. Faulkner, Sr., a factor which will be relevant in weighing the effect that the misrepresentation findings will have on Faulkner's other six broadcast licenses.

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[3] The Commission has inappropriately applied the doctrine of *res judicata* when the doctrine of collateral estoppel is applicable. *See, e.g., RKO General, Inc.*, 82 F.C.C.2d 291, 312-13 (1980).

However, Faulkner's filing of the petition to deny and the June 1970 supplement were corporate acts. They constitute the only "misconduct" which can be attributed directly to Faulkner Radio, Inc. and indirectly to James H. Faulkner, Sr. Thus, the Commission's finding that Faulkner filed a strike petition to deny may well be the *decisive factor* in its future determination of whether Faulkner can continue as the licensee of its other six stations.

III.

THE COMMISSION'S FINDINGS AND CONCLUSIONS THAT FAULKNER FILED A STRIKE PETITION ARE SO INTERRELATED WITH ITS FINDINGS AND CONCLUSIONS ON MISREPRESENTATION THAT THEY CANNOT BE SEPARATED.

The Commission stated that Faulkner's original petition to deny and June 1970 supplement were strike petitions and held this constituted a separate and distinct ground for denying Faulkner's renewal application. *See* App. 33a. The other reason for denial was that the Commission found "substantial evidence in the record" to support the conclusion that Faulkner's Vice President and minority stockholder "also displayed lack of candor and committed knowing and willful misrepresentations." *See* App. 26a. Even a cursory reading of the decisions demonstrates that these two issues were so intertwined that it is impossible to consider one ground without the other.

It was Faulkner's filing of the petition to deny in 1968 that led to the designation for hearing of its application for renewal of the license for WLBB in 1972. The factual circumstances cited by the Commission to find that the petition to deny was filed for delay were also cited by it

to find misrepresentation.[4] Moreover, these findings were interdependent.[5] The Commission found that the mis-

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[4] For example, the Commission found that Thorburn had misrepresented facts in his account of the *June 20, 1968 telephone conversation.* App. 20a-21a. Only Thorburn and Hollis Johnson, the RC attorney to whom the ALJ and the Commission accorded a presumption of veracity because he was a lawyer, know what was said in that conversation. The Commission chose to believe Johnson, who claimed that Thorburn admitted filing the petition to deny for delay (App. 32a). Similarly, the Commission found that Thorburn's testimony concerning the *Thorburn-Holey correspondence* was both evidence of Thorburn's lack of candor (App. 25a) and evidence of conduct indicating that Thorburn was trying to find ways of delaying the RC application (App. 32a). No testimony or evidence was presented or offered to rebut the testimony of Thorburn and Holey, an engineer, as to the nature and meaning of their correspondence. Yet, the Commission chose to disbelieve both. The Commission also concluded that Thorburn had submitted an improperly executed *affidavit of O.S. Whitman* that withheld information necessary to the Commission's deliberations to support Faulkner's June 1970 supplement to Petition to Deny (App. 23a) and found that the June 1970 supplement was therefore a strike pleading (App. 32a). The affidavit was signed by O. S. Whitman, the owner of the land that the RC applicants proposed as a transmitter site. Whitman swore that the land was no longer available to the Johnsons and that he had told them so. The June 1970 supplement asked for an issue on the availability of the RC site. It was undisputed that, at the time the affidavit was signed, the option contract for its purchase had expired. The Commission concluded that Faulkner (Thorburn) had made misrepresentations by concealing "a crucial fact" in the affidavit that "at the time the 'affidavit' was drafted" the land was not unavailable to RC but was in a "check back" status. App. 32a. Whitman, the owner of the land, testified that he signed the affidavit and that the facts recited therein (that his land was no longer available to the Johnsons and that he had advised them of that fact) were true when he signed the affidavit. However, the Commission chose to believe the two lawyer principals of RC over Thorburn and Whitman and erroneously focused on the time at which the affidavit was *drafted* instead of when it was *signed.*

[5] That the delay and misrepresentation findings were interdependent is clearly seen in the Initial Decision of the ALJ. The delay

[footnote continued]

representations were illustrative of the motive or intent to file a strike petition. *See* App. 32a. It also found that the purpose of filing a strike petition provided the motive or intent to make misrepresentations. *See* App. 22a-32a, 107a-108a. The criteria the Commission established to determine whether a petition to deny was filed for delay were all developed from the testimony of Robert M. Thorburn. *See* App. 29a-33a, 64a-65a. The Commission's finding that Faulkner filed a strike petition was based on its characterization of Thorburn's testimony as evasive and contradictory, confusing and unpersuasive. *See* App. 31a-32a, 64a-67a.

It is clear the Commission's finding that Faulkner filed a strike petition was necessary to its findings on misrepresentation. If the Commission had not been so determined to make an example of a licensee for the filing of a "strike" petition, it would never have reached the question of whether Thorburn had misrepresented facts and displayed a lack of candor.

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or strike petition issues, issues 5 and 6 in the order designating the Faulkner and RC applications for hearing, were the very first issues to be addressed in the Initial Decision. App. 77a-89a. The ALJ's first conclusion was that misrepresentations had been made *in order to thwart or delay* the initiation of a competing broadcast service in Carrollton, Georgia. App. 107a. The ALJ's conclusions that Faulkner made misrepresentations were derived from its findings of fact on the delay issues.

CONCLUSION

For the foregoing reasons, the requested petition for a writ of certiorari should be granted.

Respectfully submitted,

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